

EU Commission v. Hungary: The Case for the "Systemic Infringement Action"

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What can the European Union – and in particular the European Commission – do about Member States that no longer reliably play by the most fundamental European rules? The question is now urgent because several Member States are already posing such challenges. Treaty reform could give the Commission new powers. But can the Commission act without waiting for the long and arduous process of treaty reform to provide new tools?

I propose a new approach, a simple extension of an existing mechanism: the infringement action. The Commission could signal *systemic complaints* against a Member State by *bundling a group of individual infringement actions together under the banner of Article 2 of the Treaty of the European Union (TEU)*, which guarantees:

the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

A *systemic infringement action* would share with ordinary infringement actions specific complaints against the national law or consistent practices of a Member State for violating particular provisions of EU law. As a result, it would have a very concrete ground like a conventional infringement action brought by the Commission under Article 258 of the Treaty on the Functioning of the European Union (TFEU). By grouping together related complaints thematically under Article 2 TEU, however, the Commission would add the argument that the whole is more than the sum of the parts and that the set of alleged infringements rises to the level of a systemic breach of basic values.

A medical analogy might help to explain how a systemic infringement action would work. The Commission may believe that a Member State is breaching the values of Article 2 TEU, but basing a legal action on “violating the values of the EU” alone would give the Court of Justice of the European Union (CJEU) the same task that a doctor would have in attempting to treat a general complaint of “feeling bad.” A doctor needs a detailed set of concrete symptoms before being able to accurately diagnose a disease, just as the CJEU would need evidence of a pattern of concrete infringements before it could diagnose an Article 2 TEU disease. Treating each symptom on its own without aggregating the symptoms into a systemic diagnosis runs the risk of failure because fixing only one symptom or another may not eradicate the disease. Diagnosing a systemic problem in law requires the same sort of evidence as diagnosing a systemic problem in medicine. One needs to observe the full set of relevant symptoms together to understand the fundamental problem. Only then can one be confident of an accurate diagnosis and therefore a more effective treatment.

A systemic infringement action would enable the Commission to signal to the Court of Justice a more general concern about deviation from core principles than a single infringement action would allow. It would also have the advantage of putting before the CJEU *in one case* evidence of a *pattern* of violations so that the overall situation in a particular Member State is not lost in a flurry of individual infringement actions, each of which might go to a different panel of judges at the Court. The CJEU could then either agree with the Commission that the symptoms add up to a disease and find a violation of Article 2 TEU, or the CJEU could find that only certain (or even none of the) individual violations within the larger mix require treatment.

If the CJEU confirms the systemic element of the infringement action and finds a violation of Article 2 TEU, compliance should be assessed in a way that addresses both the particular infringements and the larger breach

of EU values. In such a case, a Member State should not be permitted simply to make small fixes to correct individual violations without addressing the larger threat to the principles of Article 2 TEU.

If continued systemic infringement occurs in violation of a CJEU decision, the Commission might then expand its range of sanctions beyond the current set. After all, if a Member State has been found to persistently challenge fundamental values of the EU, then its compliance with burdensome remedies cannot be assumed. Fines levied through an Article 260 TFEU action might therefore be collected by putting in escrow some portion of the Member States' EU funding streams until the Member State complies. This power to withhold funds could be given to the Commission through secondary legislation of the sort that has already been used for other conditionalities in funding, like the powers made available under the Excessive Deficit Procedure. This would provide a legal basis for the [proposal by the foreign ministers of Germany, Denmark, the Netherlands and Finland](#) that the Commission find ways to cut the funds of Member States that are in persistent and serious violation of EU principles. Allowing the Commission to stop the flow of funds following confirmation by the CJEU of both a systemic violation and continued noncompliance would ground this proposed sanction in a multi-institutional judgment like other current sanctions, giving the Commission a more "constitutional" basis for its actions.

This suggestion to withhold EU funds is the only part of my proposal that calls for any additional legal authority and such authority can be provided by secondary legislation rather than through treaty reform. The other parts of this proposal can be accomplished under existing authority. The systemic infringement action therefore gives the Commission a new tool to use now in the fight against democratic backsliding without the need for treaty reform.

A fully worked-out version of the proposal, explaining how a systemic infringement action would work, how assessment of compliance might follow and how fines might be assessed if there is continued noncompliance, can be found [here](#).

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